United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Original w/ affidavit of mailing

75-1052

To be argued by
ALVIN A. SCHALL

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1052

UNITED STATES OF AMERICA,
Appellant,

—v.—

TOMMY ROBERTS,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
ALVIN A. SCHALL,
Assistant United States Attorneys,
(Of Counsel).

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Preliminary Statement

The United States of America appeals, pursuant to Title 18, United States Code, Section 3731, from an order of the United States District Court for the Eastern District of New York (Dooling, *J.*), entered on January 20, 1975, which granted a motion by the defendant Tommy Roberts to dismiss indictment 73 Cr. 884 on the grounds that the defendant had been denied his Sixth Amendment right to a speedy trial.*

On appeal, it is the position of the United States that, under the circumstances of this case, the defendant's claim of denial of a speedy trial is without merit and that, consequently, the order of the District Court should be vacated and the indictment reinstated.

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* Defendant did not move for dismissal under the Eastern District Plan for Achieving Prompt Disposition of Criminal Cases (the "Eastern District Plan"), adopted pursuant to Rule 50(b) of the Federal Rules of Criminal Procedure.

Statement of Facts

The defendant was arrested on May 25, 1973 and charged with unlawful possession of stolen mail, in violation of Title 18, United States Code, Section 1708. He was promptly taken before United States Magistrate Vincent A. Catoggio. After he had signed a $5,000 unsecured personal recognizance bond, he was released, and a preliminary hearing was set for June 22, 1973. The hearing was later adjourned, however, and subsequently it was waived entirely. On October 2, 1973, the Government presented defendant's case to the grand jury. On that day, the grand jury voted a true bill, and an indictment was filed in the District Court, charging the defendant with ten counts of unlawful possession of stolen mail (A. 3).* The case was then randomly assigned to Judge Anthony J. Travia, before whom the defendant was arraigned, with counsel present, on October 15, 1973. After the defendant had pleaded not guilty, Judge Travia set 20 days for motions, but scheduled no trial date (A. 10). On October 23, 1973, the Government filed its Notice of Readiness for Trial, as required under Rule 4 of the Eastern District Plan (A. 11).

Also indicted on the same day as defendant, in related cases under Rule 3 of the Individual Assignment and Calendar Rules of the Eastern District, were two brothers, Alonzo and Henry Smith. In separate indictments (73 Cr. 882—Alonzo Smith, 73 Cr. 883—Henry Smith), each of the Smiths was charged, like the defendant, with multiple counts of unlawful possession of stolen mail (A. 47, A. 48).** Along with that of the defendant, their cases were assigned to Judge Travia, and at arraignment on October 15, 1973, with counsel present, they also pleaded not guilty. As he did with the defendant, Judge Travia ordered 20 days for motions, but set

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* Page references in parenthesis preceded by the letter "A." refer to pages in the Government's Appendix.

** The Smiths were also first arrested in May of 1973.

no trial date for the Smiths. On October 25 and 26, 1973, the Government filed its Notices of Readiness for Trial in the Smith cases (A. 47, A. 48).

At the time of defendant's arraignment, on October 15, 1973, agreement was reached on a disposition in defendant's case. It was agreed at that time, between the Assistant United States Attorney who was then handling the case and defense counsel, that in return for his cooperation against the Smiths, the defendant would be permitted to plead guilty to a superseding misdemeanor information, in lieu of standing trial on indictment 73 Cr. 884. The defendant was advised, however, that his plea could only be taken after the Government had completed its prosecution of the Smiths. Defendant agreed and stated that he would cooperate (A. 21, A. 30-A. 31, A. 40-A. 41).

At about the time that the defendant and the Smiths were arraigned, Judge Travia began the trial of *United States* v. *Bernstein, et al.*, 72 Cr. 587.* The *Bernstein* case lasted for nine months, until July 5, 1974. During this period, Judge Travia was unable to conduct other trials. He did, however, give attention to the other cases assigned to him on regularly scheduled motion and plea days, and certain of his cases were transferred to other judges for trial. After the completion of the *Bernstein* case, Judge Travia went on an extended vacation, and, upon his return, he announced his resignation from the federal bench. Consequently, no action was taken in the defendant's case, or in either Smith case, until November 13, 1974. On that day, defendant's case was called by Judge Dooling, to whom it had been reassigned following Judge Travia's resignation.** At that time, a trial date of February 3, 1975 was tentatively set, and it was then that the defendant raised for the first time the speedy trial issue (A. 42).

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* Appeal filed, 74-2328.

** The Smith cases were also reassigned to Judge Dooling.

In early December of 1974, following the defendant's initial assertion of the speedy trial claim, the Government renewed its offer of a misdemeanor disposition, stating that the plea could be taken prior to the completion of the Smith cases (cf. A. 33, A. 37-A. 38). This offer was rejected, however, and on December 16, 1974, the defendant filed a notice of motion to dismiss the indictment, alleging that he had been denied his Sixth Amendment right to a speedy trial (A. 13). Subsequently, on January 20, 1975, Judge Dooling granted defendant's motion in an eight page Memorandum and Order (A. 39).*

ARGUMENT

The District Court erred in dismissing the indictment.

The District Court's decision dismissing the indictment was based on the conclusion that the passage of time from the date of the defendant's arrest to his 26th birthday (approximately one year) had prejudiced the defendant by rendering him ineligible for sentencing under the Youth

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* Shortly after Judge Dooling dismissed the Roberts indictment, dispositions were reached in the Smith cases. On February 14, 1975, after discussions between the Government and counsel for the Smiths, both Alonzo and Henry Smith waived indictment and pleaded guilty to a one count information (75 Cr. 115), charging them with conspiring to fraudulently obtain mortgage loans insured by the Federal Housing Administration (Title 18, United States Code, Sections 371 and 1010) (A. 49). It has been agreed between the Government and the Smiths that the foregoing guilty plea is in satisfaction of both their postal offenses and their FHA charges and that at the time of sentencing, the Government will move to dismiss indictments 73 Cr. 882 and 883.

Corrections Act.* In holding that there had been a denial of the Sixth Amendment right to a speedy trial, Judge Dooling found that the *"reason"* for the delay was "the Government's insistence" that the defendant's disposition be deferred until the Smith cases had been completed, "combined with the more general governmental failure to provide a tribunal to the parties" (A. 45). Similarly, he found that the *"prejudice"* to the defendant was "the loss of a valuable right", noting that the chances were "real and substantial" that the defendant would have been sentenced under the Youth Corrections Act if sentencing had taken place before he was twenty-six (A. 45-A. 46).

The Government respectfully submits that the District Court erred in dismissing the indictment. To begin with, by basing the dismissal on the denial of the right to a speedy trial, Judge Dooling employed a remedy totally inappropriate in the context of this case. In no way can this properly be construed as a speedy trial case. A disposition had been agreed upon; the parties never intended that there would be a trial. In effect, without benefit of any appellate authority, the District Court has determined that the speedy trial clause of the Sixth Amendment applies to protect a defendant who at all times has been prepared to plead guilty to greatly reduced charges; who has never contemplated a trial; who has been represented by counsel

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* Title 18, United States Code, Sections 5005-5026. The Youth Corrections Act applies to "youth offenders." Section 5006 of the Act defines a "youth offender" as "a person under the age of twenty-two years at the time of conviction." Under the provisions of Title 18, United States Code, Section 4209, however, a court has the discretion of sentencing under the Act a defendant who is over 22 but under 26. In the instant case, defendant reached his 26th birthday on May 21, 1974.

The chief benefit to the defendant of being sentenced under the Youth Corrections Act would have been that he could eventually have had the conviction expunged from his record pursuant to Section 5021 of the Act.

throughout; who has been free on bail since his arrest; and who has remained completely silent throughout the pendency of all proceedings until he passed his 26th birthday, after which he asserted that, because he could no longer be sentenced under the provisions of the Youth Corrections Act, he had been prejudiced by the delay in convicting him. Furthermore, even if this case is viewed in the framework of a speedy trial issue, the District Court's ruling still emerges as being clearly erroneous. In reaching his decision to dismiss the indictment, Judge Dooling not only gave scant attention to the crucial fact that the Government and the defendant had entered into a good faith agreement to dispose of the defendant's case, but he also failed to properly weigh and balance, in the light of the relevant circumstances, the four factors prescribed by the Supreme Court in *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972). In sum, the United States believes that the District Court has misused the speedy trial clause and has needlessly misapplied "the unsatisfactorily severe remedy of dismissal of the indictment." 407 U.S. at 522 (1972).

(1)

We think it plain that the Sixth Amendment guarantee of a "speedy . . . trial" does not mean that a defendant is entitled by that clause to a speedy sentence upon a plea of guilty.* No case has so held and the clause speaks only of trials. Certainly, the remedy contemplated under the clause, dismissal of otherwise valid indictments, is hardly appropriate to the situation in this case, where the defendant does not assert any prejudice to the fact finding

* In terms of the "prejudice" which defendant asserted in the District Court, the crucial event would have been the sentencing. Thus, even if appellant had been permitted to plead guilty immediately, his sentence would have been adjourned until after the trial of the *Smiths*, a customary practice with cooperating accomplices.

process.* Thus, the rationale of the District Court, which astoundingly recognized that the "precise tests of *Barker* v. *Wingo* are ill-suited to the determination of the present case" (A. 44), plainly ignores that defendant has not claimed, nor could he, that he has been denied the right to a prompt "trial".

The rationale of the District Court also ignores the time element expressed in the clause: ". . . magnitude of *delay* is not here significant in the usual way" (A. 44, emphasis in original). Under the inflexible standard of the District Court, therefore, *any* delay by the Court or the Government, regardless of how well justified, would require dismissal so long as defendant was not rushed to a sentencing date before his 26th birthday. Such a disregard of the time element hardly comports with the Supreme Court's admonition in *United States* v. *Marion*, 404 U.S. 307, 324-325 (1971): "Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay caused detriment to a defendant's case should abort a criminal prosecution [footnote omitted]." Thus, the District Court, in order to reach its conclusion that the "motion must be granted on the constitutional ground" (A. 46), had to ignore the two central and literal requirements of the clause, "speedy" and "trial". Under those circumstances, it is little wonder that the District Court did not apply the tests suggested by *Barker* v. *Wingo* for the reason that the "context of application is so different". Such difference arose, we submit, because the "speedy trial" clause confers no rights upon this defendant. As hereinafter argued, however, even if the clause is applicable to this case, we submit that the tests supplied by *Barker* v. *Wingo* nonetheless mandate a reversal of the District Court's order.

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* The District Court found that: "No claim is made that the defendant's ability to defend has been impaired by the delay, and, indeed, in the frame of reference in which the case exists, trial and defense are not genuinely involved" (A. 43-A. 44).

(2)

The Supreme Court has identified four factors which are to be considered when determining whether or not a defendant has been denied his right to a speedy trial. Those four factors are length of delay, the reason for the delay, the defendant's assertion of his right and prejudice to the defendant. *Barker* v. *Wingo*, *supra*, 407 U.S. at 530 (1972). In making its determination, a court is to apply these factors to the "circumstances" of the case, *United States* v. *Ewell*, 383 U.S. 116, 120 (1966); *Pollard* v. *United States*, 352 U.S. 354, 361 (1957), and then weigh them, in what the Supreme Court has called "a difficult and sensitive balancing process." *Barker* v. *Wingo*, *supra*, 407 U.S. at 533.

With regard to the length of the delay, it is submitted that the period in question here is approximately twelve months. That is the length of time which passed between the defendant's arrest and his 26th birthday. Although it was some 18 months after the date of arrest that the case was first called before Judge Dooling, on November 13, 1974, and although it would have been approximately 20 months before the case went to trial, on February 3, 1975, neither of these periods is relevant in the context of this case. Since a disposition had been agreed upon, there was to be no trial. The prejudice which the defendant alleges with respect to sentencing under the Youth Corrections Act, and it is the only prejudice which he alleges, attached and attained its full and final impact the instant he became twenty-six. It was in no way increased by the additional months which intervened between May of 1974 and November of that year and February of 1975.

From the cases, it is clear that no matter how lengthy the period of delay is in a particular situation, it alone will not be dispositive of a speedy trial claim. In *Barker* v. *Wingo*, after eschewing the imposition of defined time limitations in the application of constitutional standards,

the Supreme Court rejected a speedy trial claim where the delay between arrest and trial was over five years.* More recently, in *Moore* v. *Arizona,* 414 U.S. 25 (1973), a delay of 28 months was under scrutiny. Finding that the state courts had misapplied the standards set forth in *Barker,* the Court reversed and remanded for reconsideration, without comment on the length of the delay. Furthermore, this Court, in a post-*Barker* decision, found that a delay of 21 months from arrest to indictment, when coupled with a delay of 28 months from indictment to trial, was not "extraordinary." *United States* v. *Infanti,* 474 F.2d 522, 527 (2d Cir. 1973).**

As noted in *Barker,* length of delay is merely a triggering mechanism. There must be a period of delay which is presumptively prejudicial before it is necessary to inquire into the other balancing factors. 407 U.S. at 530. In the instant case, it is submitted that under constitutional standards, a delay of twelve months was not unreasonable and should not be found to be presumptively prejudicial. Moreover, of decisive significance is the uncontested fact that the delay in this case was, for the most part, during the period of defendant's cooperation and, as such, "was attributable to the defendant." *United States* v. *Singleton,* 460 F.2d 1148, 1151 (2d Cir. 1972), *cert. denied,* 410 U.S. 984 (1973).

Turning next to the reasons for the delay, it is true, as Judge Dooling stated, that it was the Government who

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* A delay of some 20 months occurred after Barker expressly raised his speedy trial claim.

** Additionally, it is to be noted that in the following cases, each of which was post-*Barker* and each of which involved a delay from arrest or indictment to trial of 12 months or more, no denial of the right to a speedy trial was found: *United States* v. *Saglimbene,* 471 F.2d 16 (2d Cir. 1972), *cert. denied,* 411 U.S. 966 (1973) (6 years); *United States* v. *Counts,* 471 F.2d 422 (2d Cir.), *cert. denied,* 411 U.S. 935 (1973) (16 months); *United States* v. *Fasanaro,* 471 F.2d 717 (2d Cir. 1973) (4 years); *United States* v. *Nathan,* 476 F.2d 456 (2d Cir.), *cert. denied,* 414 U.S. 823 (1973) (24 months); *United States* v. *Joyner,* 494 F.2d 501 (5th Cir. 1974) (12 months); *United States* v. *Annerino,* 495 F.2d 1159 (7th Cir. 1974) (15 months).

required that the defendant's disposition await the completion of the Smith prosecutions. However, this requirement was not one which was forced on the defendant or suddenly sprung on him. At the very outset, on October 15, 1973, the defendant was told that his plea could be taken only after the Smith Cases were completed. He was certainly free to reject the Government's offer; instead, he accepted it. Furthermore, the terms of the disposition were in the interests of both parties involved, not just the Government. While the Government gained the benefit of the defendant's cooperation in its case against the Smiths, the defendant had removed from over his head the threat of going to trial, and of possibly being convicted, on a ten count felony indictment.*

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* To be distinguished is the case of *United States* v. *Hanna*, 347 F. Supp. 1010 (D. Del. 1972), cited by Judge Dooling in his Memorandum and Order. In *Hanna*, the defendant was arrested on April 13, 1971 and charged with interstate transportation of a stolen motor vehicle, in violation of Title 18, United States Code, Section 2312. At the time of his arrest he was told he would not be prosecuted if he cooperated with the Government in another case. Sometime later, however, in December of 1971, the person against whom the defendant was to testify jumped bail, and in March of 1972 the defendant was charged, in the first count of a two count indictment, with the offense for which he had been arrested in April of 1971. In moving to dismiss that count of the indictment, the defendant asserted that he had been denied his Sixth Amendment right to a speedy trial. The court agreed, finding that although the delay involved was not *"per se"* excessive and that the defendant had suffered no prejudice and had not asserted his claim, the delay in returning the indictment was at the instigation of the Government, which used the threat of an indictment to induce testimony from the defendant.

In Hanna, the delay was caused solely by the Government, a factor which the Supreme Court stated in *Barker* v. *Wingo* is to weighed particularly heavily against the prosecution. *Barker* v. *Wingo*, *supra*, 407 U.S. at 531. As will be discussed below, court congestion was the underlying cause for delay in the defendant's case. Moreover, in *Hanna* the Government used the possibility of indictment as a threat against the defendant and then, although Hanna did not so allege, apparently reneged on its bargain.

The reason for the delay in consummating the disposition agreement between the Government and the defendant is undisputed. Judge Travia was actively engaged on trial until July of 1974 and was unable to reach the Smith cases. Following the completion of *United States* v. *Bernstein et al.*, Judge Travia went on a lengthy vacation, and after his return he announced his resignation from the federal bench. Defendant's case was then reassigned to Judge Dooling. There is no suggestion made that the Government was in any way responsible for this period of delay. While recent cases have indicated that calendar congestion and other institutional defects are chargeable against the Government, see *Barker* v. *Wingo*, *supra*, 407 U.S. at 531, *United States* v. *West*, 504 F.2d 253 (D.C. Cir. 1974); *United States* v. *Fay*, 505 F.2d 1053 (1st Cir. 1974),* the *Barker* court made

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* *West* and *Fay* are recent Circuit Court opinions which extend to an unprecedented degree the Government's responsibility for delay caused by non-prosecutorial, institutional conditions. Each, however, is clearly distinguishable from the instant case.

In *West*, the defendant was incarcerated for 13 months before trial. The case was a simple one, the offense non-violent. Defendant twice demanded a speedy trial during the 13 months delay. The only reason proffered by the Government for the delay was calendar difficulties. When finally tried, the total transcript of testimony was 54 pages. Under the circumstances, the District of Columbia Circuit found the delay unjustified, and charged the Government as a whole with the responsibility to insure speedy trials. That the delay was attributed solely to calendar congestion, under the circumstances of that case, was held to be of no consequence.

In *Fay*, a delay of nine months was found to have resulted in the loss of a critical witness. A year before the case came to trial defense counsel interviewed the sole defense witness to an undercover narcotics sale. Counsel for the defendant had notes of the interview indicating that the witness would exculpate his client. At the time of trial the witness had disappeared. Though the delay was due wholly to calendar congestion, and counsel had made little effort to maintain contact with the witness, the court charged the Government with the prejudice to the defendant as a

[Footnote continued on following page]

it clear that judicial rather than prosecutorial delay is "[a] more neutral reason" which "should be weighed less heavily" against the Government. 407 U.S. at 531. Moreover, the Second Circuit has had little difficulty in dismissing claims such as defendant's. In *United States* v. *Garelle*, 438 F.2d 366, 369 (2d Cir. 1970), *cert. dismissed*, 401 U.S. 967 (1971), Judge Kaufman, writing for the Court, found the appellant's claim "hypertechnical and barren", adding emphatically, "Indeed, the 'delay' was solely attributable to the length of the trial over which Judge Tyler was then presiding." See also, *United States* v. *Infanti*, *supra*, 474 F.2d at 527, in which this Court rejected a claim based on calendar congestion in the Southern District, noting that "the reason for the delay was neither negligence nor inefficiency on the part of the Government."*

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result of institutional breakdown. It should be noted that the defendant Fay had also demanded a speedy trial one month after indictment. The court held that as a result of the critical nature of the missing witness and the unavailability of the testimony, the defendant had been prejudiced.

In the instant case, having entered into an agreement with the Government, defendant did not raise the speedy trial issue at any time until November 13, 1974, and he was never incarcerated. Even if the court should find the Government chargeable with the calendar congestion which caused the delay in the instant case, there were not here present the other balancing factors which would justify dismissal of the indictment.

* Recently, in a somewhat different context, this Court had occasion to face the problems created in Judge Travia's trial calendar by the *Bernstein* case. In *United States* v. *Drummond*, ——F.2d——, Slip opinion, 1781 (2d Cir. February 11, 1975), two of the claims raised by Dennis Drummond on appeal centered on the delay in retrying him following the reversal of his previous conviction (*United States* v. *Drummond*, 481 F.2d 62 (1973)). Drummond's first conviction was reversed on July 5, 1973. For some reason, however, the mandate of the court did not issue until September 14, 1973, and was not received in the Eastern District until September 19, 1973. The case was then randomly assigned to Judge Travia. After that, with Judge Travia engaged in the

[Footnote continued on following page]

It is clear that the "prejudice" to the defendant in this case must be viewed and weighed in the context of the relevant facts. As we have previously noted, it has the most tenuous links to the policies underlying the speedy trial clause. Laying that aside, however, there is to be balanced against that prejudice what the defendant gained from his agreement with the Government. By accepting the Government's disposition offer, the defendant escaped from the threat of going to trial and being convicted on ten felony counts. It is not unreasonable to view the loss of Youth Corrections Act treatment as being more than compensated for by not having to stand trial on indictment 73 Cr. 884. Furthermore, although the defendant has, by the passage of time, lost the *right* to be sentenced under the Youth Corrections Act, it is by no means certain that he would have in fact been so sentenced. In addition, it would certainly be within the discretion of any judge who now sentenced the defendant on a misdemeanor plea to take into account the fact that the defendant had been disadvantaged by already having passed his 26th birthday.

Bernstein trial, Drummond's case was not called until April of 1974, and it was shortly thereafter that Drummond moved to dismiss the indictment. Judge Travia denied the motion, and Drummond went to trial and was convicted before Judge Thomas C. Platt, in July of 1974.

On appeal, Drummond argued that the delay in retrying him violated Rule 6 of the Eastern District Plan (retrials to commence not later than 90 days after reversal, "unless extended for good cause"). He also claimed that he had been denied his Sixth Amendment right to a speedy trial. The Court rejected both of Drummond's contentions. With respect to the Rule 6 claim, Judge Feinberg stated, "Under all the circumstances, we regard the relevant time period as extended 'for good cause' until Judge Travia reassigned the case to Judge Platt and it was called by Judge Platt shortly thereafter." *United States* v. *Drummond*, *supra*, Slip opinion at 1788. In dealing with Drummond's speedy trial claim, the Court failed to find "any indication that the delay was caused by deliberate prosecutorial effort to postpone the trial." *Id.* at 1790.

The fourth factor which must be weighed by the Court in deciding upon the defendant's speedy trial claim is the fact that at no time prior to November 13, 1974 did the defendant make any effort to assert his rights. In *Barker* v. *Wingo,* the Supreme Court made it explicitly clear that failure on the part of an accused to assert his speedy trial right is a factor to be given weighty consideration. The Court stated (407 U.S. at 531-532):

> . . . The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight when determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

See also, *United States* v. *Lasker,* 481 F.2d 229, 237 (2d Cir. 1973), *cert. denied,* 415 U.S. 975 (1974).

The Government submits that in the circumstances of this case, the failure of the defendant to assert his speedy trial right is virtually devastating to his claims. Defendant was advised, at the very outset, in October of 1973, that his case would not be finally disposed of until the Government had completed its prosecution of the Smith brothers. Knowing this, the defendant accepted the disposition plan which was offered to him, and he never once complained of the wait which ensued. Instead, he remained silent until the case was reassigned from Judge Travia in November of 1974. In effect, apparently satisfied with the course of events, the defendant made no attempt to alter what transpired after his discussions with the Government.

The crucial point in this case is that there was an agreement between the Government and the defendant. It is for this reason that the failure of the defendant to question or

complain about the timing of his disposition assumes even more than its usual significance. The Government and the defendant were no longer in an adversary relationship, where, as the Supreme Court has recognized, there is no obligation on the accused to demand a speedy trial. *Barker* v. *Wingo*, *supra*, 407 U.S. at 527-528. The roles were changed; an agreement had been entered into. It was entirely reasonable for each party to expect and believe that silence from the other meant that the original understanding continued. If the defendant was concerned over the possibility that he would become ineligible for sentencing under the Youth Corrections Act, the proper thing for him to have done would have been to go, either directly or through his counsel, to the Government and raise the issue. In that way, he could have alerted the Government to the problem and possibly have attempted to have the terms of the disposition plan changed.

In his Memorandum and Order, Judge Dooling took the position that "practically, such an approach would not be easy," arguing that it might have had the result of making the Government "insist on a felony plea or a transfer of the case to another judge for speedy trial on the ten felony charges" Memorandum and Order (A. 45). We can hardly perceive how such speculation of what stance the United States would have taken if the defendant had made such a request adds to the analysis of this case. The defendant never did make the request; there is no evidence to support the notion that he did not (or his attorneys did not) because of fear of rejection; or that the United States would have rejected the request, even though it could properly have sought to insure the continued cooperation of the defendant by requesting, at least, adjournments of his sentencing until after the Smith trial.* Clearly, in the setting of this case,

* Even though the Smith cases are being disposed of, the Government stands ready to honor its agreement with the defendant. If this Court should vacate Judge Dooling's order, the defendant will still be permitted to plead guilty to a misdemeanor information.

the failure of the defendant to utter a timely word with respect to the disposition of his case is a factor which must be weighed heavily and decisively against him.*

The Government respectfully submits that a balancing of the circumstances evidenced by the facts in this case compels the conclusion that the defendant has not been denied his right to a speedy trial. Applying the "'flexible' standards based upon practical considerations" prescribed by *Barker* v. *Wingo*, see *Strunk* v. *United States*, 412 U.S. 434, 438 (1972), the order of the District Court should be vacated and the indictment should be reinstated.

CONCLUSION

The order of the District Court should be reversed and the indictment should be reinstated.

Dated: February 19, 1975

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
ALVIN A. SCHALL,
Assistant United States Attorneys,
(Of Counsel).

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* We note, parenthetically, that if the "right" of a defendant to suppress unconstitutionally seized evidence must be made at a time when the right may be appropriately implemented, see *United States* v. *Mauro*, —— F.2d —— Slip opinion 483 (2d Cir. November 25, 1974), the defendant's so-called "right" to Youth Corrections Act treatment, should also be asserted at a time when the "right" can be implemented and not after it is impossible to consider its appropriateness.

AFFIDAVIT OF MAILING

COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

EVELYN COHEN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 21st day of February 19 75 he served a copy of the within

2 copies of Appellant's Brief

by placing the same in a properly postpaid franked envelope addressed to:

William J. Gallagher, Esq.
Legal Aid Society
Federal Defender Services Unit
509 United States Courthouse
New York, New York 10007

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Evelyn Cohen

Sworn to before me this

21st day of February 19 75

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977